92-12641

No.

Supreme Court, U.S.
FILED
JAN 27 1993
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In The

Supreme Court of the United States

October Term, 1992

SAMUEL V. SOTIR and NORMAN P. JOHNSON,

Petitioners,

vs.

UNITED STATES OF AMERICA
INTERNAL REVENUE SERVICE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether voluntary undesignated payments of funds from the general operating account of a corporate taxpayer were "trust-fund monies" and as such must be first applied to the trust-fund portion of its corporate tax liability?*

LIST OF PARTIES TO THIS PROCEEDING

Your Petitioners in the instant proceeding are Samuel V. Sotir and Norman P. Johnson, Plaintiffs in a proceeding which was originally commenced in the United States District Court, District of Massachusetts under Civil Action No. 89-40068XX on July 12, 1989. The Respondent in this proceeding is the United States of America, Internal Revenue Service.

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OPINION BELOW

Samuel V. Sotir and Norman P. Johnson v. United States of America, 978 F.2d 29 (1st Cir. 1992).

STATEMENT OF JURISDICTION

Your Petitioners appeal from the Opinion and Judgment of the United States Court of Appeals for the First Circuit filed on October 30, 1992.

Original jurisdiction for the proceeding in the United States District Court was founded on 28 U.S.C. § 1346(a)(1). Appellate review by the United States Court of Appeals for the First Circuit was pursuant to 28 U.S.C. § 1294.

This Petition for a Writ of Certiorari is brought pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

IRC § 7501:

LIABILITY FOR TAXES WITHHELD OR COLLECTED.

> (a) General Rule. — Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose.

26 U.S.C. § 7501(a) (1986).

STATEMENT OF THE CASE

Your Petitioners respectfully request this Court review a decision rendered by the United States Court of Appeals for the First Circuit which affirmed a decision of the United States District Court, District of Massachusetts.

The Petitioners herein are the responsible persons of R & M Industries, Inc., a Massachusetts Corporation (hereinafter referred to as "R & M").

The original action was commenced by the Petitioners in the United States District Court, District of Massachusetts under 28 U.S.C. § 1346(a)(1) seeking to require the Internal Revenue Service (hereinafter referred to as "IRS") to apply voluntary undesignated payments of corporate funds first to the trust-fund portion of the corporate tax liability.

The facts critical to the matter were never in dispute and were largely stipulated before the United States District Court by a Stipulation of Facts and Issues to be Tried.[1]

R & M conducted business in Massachusetts from August 1985 through April 5, 1987, when it ceased doing business.

Sotir and Johnson were shareholders, officers, directors and responsible persons of R & M during this entire period of time.

As an employer, R & M was required to withhold federal income taxes and to collect Federal Insurance Contribution Act taxes (FICA) from its employees' wages. *See* 26 U.S.C. § 3402(a) (income taxes) and § 3102(a) (FICA taxes), respectively. Because the amount of these taxes is held to be a special fund in trust for the

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1. A copy of the Stipulation is attached and included in the Appendix to this Petition.

United States under 26 U.S.C. § 7501, they are often called "trust-fund taxes."

R & M withheld FICA and federal income taxes from the wages of its employees during the four quarters of 1986 and the first two quarters of 1987. However, with the exception of two payments made in the second and third quarters of 1986, R & M failed to remit to the IRS the withheld amounts as required.

Consequently, the IRS assessed the unpaid balance of the trust fund taxes against Sotir and Johnson, the responsible persons of R & M.

After the assessments were made against Sotir and Johnson, R & M sent payments to the IRS totalling $57,587.61 drawn on the corporate account. R & M did not designate whether these payments should be applied to its trust-fund tax liability or to its liability for its own share of the FICA taxes.

Upon receiving the undesignated payments, the IRS allocated $41,492.26 to the trust-fund tax portion of R & M's liabilities and allocated the remaining $16,095.35 to the non-trust-fund tax liability. Sotir and Johnson claimed in the United States District Court that the IRS erred as a matter of law in failing to apply all of the payments to R & M's trust-fund tax liability, which would have reduced their own personal liability resulting from assessments made under 26 U.S.C. § 6672(a).

The United States District Court, in a bench opinion, ruled against Sotir and Johnson and held, in effect, that since there was no designation as to how the payments were to be applied, the IRS could apply such payments to whichever tax liability it deemed appropriate.

The First Circuit affirmed the opinion of the United States

District Court. The essence of its position is as follows:

> When a taxpayer makes a voluntary payment without indicating the liability to which the payment is to be applied, ordinarily the IRS may apply the payment to whichever liability of the taxpayer it chooses. See *Davis v. United States*, 961 F.2d 867, 878 (9th Cir. 1992); *Wood v. United States*, 808 F.2d 411, 416 (5th Cir. 1987); *Muntwyler v. United States*, 703 F.2d 1030, 1032 (7th Cir. 1983). See also Rev. Rul.79-284, 1979-2 C.B. 83. This rule has been approved in several circuits, *no contrary authority is cited to us*, and we follow that rule here.

(Emphasis supplied). *Sotir v. United States*, 978 F.2d 29 at 30 (1st Cir. 1992).

The First Circuit rejected Petitioners' reliance on the Supreme Court's decision in *Begier v. Internal Revenue Service*, 496 U.S. 53, 110 S.Ct. 2258, 110 L. Ed. 2d 46 (1990).

Sotir and Johnson argue that in this case, as in *Begier*, the payments to the IRS by the corporation were derived from funds held in trust and that the IRS, without any direction from the corporation, should have first applied the payments to cover the trust-fund tax liabilities.

The First Circuit distinguished the instant suit from *Begier* by stating as follows:

> . . . the point of departure in *Begier* was the taxpayer's designation, by agreement with the IRS, that all of the payments in that case would

> be allocated to 'specific trust-fund tax obligations' of the taxpayer. *Id.* at 56, 110 S.Ct. at 2261. In substance, *Begier* gave effect to this designation, made at the time of payment, in order to classify the funds used in payment as trust-fund taxes, thereby shielding the payments from avoidance as preferences. In the present case, by contrast, R & M made no designation when it made its payment to the IRS.

Id. at 31.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS FOR THE FIRST CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE APPLICABLE DECISION OF THIS COURT.

It is respectfully presented that a writ of certiorari should be granted by Your Honorable Court in this proceeding.

This Court recognizes that when a United States Court of Appeals has decided an important question of federal law in a way that conflicts with an applicable decision of this Court, this becomes a consideration for a review of the appellate decision. *See* Rule 10.1(c) of Rules of the Supreme Court.

The importance of the federal question herein and the likelihood that the policy-making decision of the Supreme Court might be further misinterpreted mandate that this Court review the First Circuit decision. *See Chemical Waste Management, Inc. v.*

Guy Hunt, Governor of Alabama, et al., 504 U.S. __, 119 L. Ed. 2d 121, 112 S. Ct. 2009 (1992).

II.

THE THEORY SUPPORTING THE OPINION OF THE FIRST CIRCUIT IS CONTRARY TO THE PRIOR DECISION OF THIS COURT.

The issue in the instant suit is exactly the same as in *Begier* — whether the monies that the corporate taxpayer paid to the IRS from its general operating account were "trust-fund monies."

This Court in *Begier*, in analyzing the issue, first looked for specific statutory guidance and found none. This Court then reviewed common law rules with respect to trusts and found the rules "unhelpful in this special context."

> In the absence of specific statutory guidance on how we are to determine whether the assets transferred to the IRS were trust property, we might naturally begin with the common-law rules that have been created to answer such questions about other varieties of trusts. . . . Unlike a common-law trust, in which the settlor sets aside particular *property* as the trust res, Section 7501 creates a trust in an abstract 'amount' — a dollar *figure* not tied to any particular assets — rather than in the actual dollars withheld. Common-law tracing rules, designed for a system in which particular property is identified as the trust res, are thus unhelpful in this special context.

Id. at 62.

Finally, this Court analyzed the legislative history of the Bankruptcy Code as it was enacted in 1978, specifically the House Report that accompanied the legislation. It then applied this House Report in making its decision regarding trust-fund taxes withheld or collected. This Court reasoned that there must be some connection between the trust-fund monies withheld and the monies sought to be applied to the debtor's trust-fund obligation. This Court concluded that the legislative history showed that the debtor's act of voluntarily paying its trust-fund obligation was sufficient to establish the required nexus between the amount held in trust and the funds paid to the IRS.

> . . . Congress expected that the IRS would have to show *some* connection between the Section 7501 trust and the assets sought to be applied to a debtor's trust-fund tax obligations. . . . The question in this case is how extensive the required nexus must be . . . The House Report does, however, give sufficient guidance regarding those assumptions to permit us to conclude that the nexus requirement is satisfied here. That Report states:
>
> > A payment of withholding taxes constitutes a payment of money held in trust under Internal Revenue Code Section 7501(a), . . . if they have been properly held for payment, as they will have been if the debtor is able to make the payment.
>
> . . . As the House Report expressly states, the limitation that the funds must "have been properly held for payment" is satisfied "if the debtor is able to make the payments." The

> debtor's act of voluntarily paying its trust-fund tax obligation therefore is alone sufficient to establish the required nexus between the "amount" held in trust and the funds paid.

Id. at 65, 66.

It should be noted that the First Circuit in its opinion in the instant suit did not cite the analysis in the *Begier* case as authority for its position. It merely cited the last sentence in the first paragraph of the recitation of the factual statement in *Begier* as reliance for its opinion, to wit:

> . . . AIA and the IRS agreed that all of these payments would be allocated to specific trust-fund tax obligations.

Sotir v. United States, 978 F.2d 29 at 31 (lst Cir. 1992).

The First Circuit did not refer to any portion of the analysis contained within the *Begier* opinion (*id.* at 62-67) in support of its conclusion.

This Court, in arriving at the test that any voluntary payment is alone sufficient to establish the required nexus between the amount held in trust and the funds paid, did not refer to the fact that there was a written agreement between the IRS and the corporate taxpayer as to the application of monies paid.

If this Court, in deciding *Begier*, had determined that the agreement between the corporate taxpayer and the IRS had any significance, then it would appear that this Court would have either:

(1) cited the agreement as determinative of the trust-fund

issue and would have found it unnecessary to examine the legislative history as it relates to a § 7501 trust; or

(2) examined the legislative history and decided that, *absent* other evidence, the act of payment to the IRS by the corporate taxpayer satisfies the test of "reasonable assumption." However, since there is other evidence — *i.e.*, the agreement between the corporate taxpayer and the IRS — it is not necessary to consider the test of reasonable assumption.

It appears that the First Circuit, in its analysis of this issue, disregarded this Court's test in arriving at its decision.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request this Honorable Court to issue a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the First Circuit as entered in this matter.

Respectfully submitted,

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APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED OCTOBER 30, 1992

No. 92-1061

SAMUEL V. SOTIR AND NORMAN P. JOHNSON,

Plaintiffs, Appellants,

v.

UNITED STATES OF AMERICA,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Robert E. Keeton, *U.S. District Judge*]

Before

Torruella, Cyr, and Boudin, *Circuit Judges.*

Carl Emmett Baylis was on brief for appellants.

Christine A. Grant, Attorney, Department of Justice, with whom *A. John Pappalardo,* United States Attorney, *James A. Bruton,* Acting Assistant Attorney General, *Gary R. Allen,* Attorney, department of Justice, and *Richard Farber,* Attorney, Department of Justice, were on brief for appellee.

October 30, 1992

BOUDIN, *Circuit Judge.* The sole question presented on this appeal is whether, when a taxpayer with several tax liabilities sends a payment to the Internal Revenue Service but fails to specify the liability to which the payment applies, the IRS may

apply the payment to the liability it chooses. In agreement with the district court in this case and in accord with other circuits, we hold that the IRS may make this choice.

Samuel V. Sotir and Norman P. Johnson were officers, directors and shareholders of R & M Industries, Inc. ("R & M"), a Massachusetts corporation. The corporation incurred two forms of tax liability at issue here. First, pursuant to 26 U.S.C. §§ 3102, 3402, the corporation withheld from its employees' wages both social security ("FICA") taxes and federal income taxes. Employers are required to hold these withheld funds "in trust for the United States," 26 U.S.C. § 7501(a), and thus the taxes are sometimes referred to as "trust-fund" taxes. *See United States v. Energy Resources Co., Inc.*, 495 U.S. 545, 546-547 (1990). Second, FICA being a tax imposed separately on both the employer and the employee, R & M was liable for its own share of FICA taxes.

The corporation withheld FICA and federal income taxes from the wages of its employees during the four quarters of 1986 and the first two quarters of 1987. However, with the exception of two small payments made in the second and third quarters of 1986, the corporation failed to remit to the IRS the withheld amounts as required by law. Consequently, pursuant to 26 U.S.C. § 6672(a), authorities assessed penalties against Sotir and Johnson equal to $146,559.83, the unpaid balance of the withheld trust-fund taxes. When employers fail to pay trust-fund taxes, then under section 6672(a) "the government can collect an equivalent sum directly from the officers or employees of the employer who are responsible for their collection and payment." *In re Energy Resources Co.*, 871 F.2d 223, 225 (1st Cir. 1989), *aff'd sub nom. United States v. Energy Resources Co., Inc.*, 495 U.S. 545 (1990). Sotir and Johnson both concede that they are such responsible persons.

Appendix A

After the assessments were made against Sotir and Johnson, R & M sent payments to the IRS totaling $57,587.61 drawn on the corporate account. The corporation did not designate whether these payments should be applied to its trust-fund tax liability or to the corporation's liability for its own share of the FICA taxes. "IRS policy has long permitted a taxpayer who '*voluntarily*' submits a payment to the IRS to designate the tax liability (*i.e.*, 'trust fund' or non-trust fund tax debts) to which the payment will apply." *In re Energy Resources Co.*, 871 F.2d at 227.

Upon receiving the undesignated payments, the IRS allocated $41,492.26 to the trust-fund tax portion of the corporation's liabilities and allocated the remaining $16,095.35 to the non-trust-fund tax liability. Sotir and Johnson claimed in the district court that the IRS erred as a matter of law in failing to apply all of the payments to the corporation's trust-fund tax liability, which would have reduced their own personal liability resulting from assessments made under section 6672(a). The district court rejected their position and so do we. Their position is inconsistent with the governing general rule, and we are unpersuaded by their attempt to avoid that rule by interposing a recent Supreme Court decision.

When a taxpayer makes a voluntary payment without indicating the liability to which the payment is to be applied, ordinarily the IRS may apply the payment to whichever liability of the taxpayer it chooses. *See Davis v. United States*, 961 F.2d 867, 878 (9th Cir. 1992); *Wood v. United States*, 808 F.2d 411, 416 (5th Cir. 1987); *Muntwyler v. United States*, 703 F.2d 1030, 1032 (7th Cir. 1983). *See also* Rev. Rul. 79-284, 1979-2 C.B. 83. This rule has been approved in several circuits, no contrary authority is cited to us, and we follow that rule here. The rule applied in tax cases accords with the broader convention that when a debtor has more

than one debt owing to a creditor, "the debtor or party paying the money may, if he chooses to do so direct its appropriation; if he fail, the right devolves upon the creditor." *National Bank of the Commonwealth v. Mechanics' National Bank*, 94 U.S. 437, 439 (1876).

In this case, when the IRS received the tax payments from R & M without any direction as to their application, the IRS applied a portion ($16,095.35) to R & M's own tax liability for FICA taxes. To this extent, its action was consistent with its ordinary policy of first allocating undesignated payments to cover non-trust-fund liabilities. *See* IRS policy statement P-5-60, May 5, 1984, *reprinted in* 1 Internal Revenue Manual (CCH), at 1305-14. "Obviously it is normally to the IRS's best interest to apply payments to that part of the corporate debt that is not secured by the trust obligation of its 'responsible' officers. The IRS policies designed to maximize the public fisc by collecting all taxes due are entitled to great weight." *New Terminal Stevedoring, Inc. v. M/V Belnor*, 728 F. Supp. 62, 65 (D. Mass. 1989).

Sotir and Johnson, of course, do not object to the IRS's allocation of over two-thirds of the R & M payment to its trust-fund tax liability, an apparent deviation from the IRS's ordinary policy that is unexplained in the record but favored their interests. Rather they contend that it was error for the IRS to apply any portion—here, $16,095.35—of the payments to the corporation's own tax liability while its trust-fund tax liability remained unpaid. On this appeal, Sotir and Johnson argue that the general rule giving the IRS discretion to allocate undesignated payments has been altered, at least where trust-fund taxes are involved, by the Supreme Court's decision in *Begier v. Internal Revenue Service*, 496 U.S. 53 (1990).

The argument, although inventive, is without force. In *Begier,* a taxpayer made certain payments of trust-fund taxes to the IRS—including both excise taxes collected from customers and income and FICA taxes withheld from employees—within 90 days before filing a bankruptcy petition. *Id.* at 56. The bankruptcy trustee thereafter filed an action against the IRS to "avoid" (that is, to recover for the estate) those payments to the IRS as a "preference" under 11 U.S.C. § 547(b). *Id.* That section provides in relevant part that a transfer of its property by a debtor to pay a prior debt, where the transfer occurs within 90 days before the debtor files a bankruptcy petition, is recoverable by the trustee in bankruptcy. The reason is to prevent a preference to the creditor as against other claimants to the estate.

The Supreme Court held in *Begier* that, under the Bankruptcy Code, the payments could not be avoided because they were not made from property of the taxpayer, but rather from funds held in trust for the government pursuant to 26 U.S.C. § 7501. *Id.* at 67. The Court declared that even though the funds had not been segregated by the taxpayer, a "trust" had arisen "within the meaning of § 7501" at the moment that the excise taxes were collected from customers and FICA and income taxes withheld from employees' wages. *Id.* at 61-62. This alone did not resolve the case because the payments themselves could not be traced back under common law tracing principles to any particular funds of the taxpayer; but, relying primarily on Banruptcy Code legislative history, the Supreme Court decided that "the debtor's act of voluntarily paying its trust-fund tax obligation . . . is alone sufficient to establish the required nexus between the 'amount' held in trust and the funds paid" to the IRS. *Id.* at 66-67.

Sotir and Johnson argue that in this cse, as in *Begier,* the payments to the IRS by the corporation were derived from funds

held in trust and thus the IRS, without any direction from the corporation, should have applied the payments to cover the trust-fund tax liabilities. Unfortunately for this argument, the point of departure in *Begier* was the taxpayer's designation, by agreement with the IRS, that all of the payments in that case would be allocated to "specific trust-fund tax obligations" of the taxpayer. *Id.* at 56. In substance, *Begier* gave effect to this designation, made at the time of payment, in order to classify the funds used in payment as trust-fund taxes, thereby shielding the payments from avoidance as preferences. In the present case, by contrast, R & M made no designation when it made its payment to the IRS. Indeed, it is the failure to do so that has landed Sotir and Johnson in their present predicament.

The Supreme Court's analysis in *Begier* related solely to the impact of a taxpayer designation upon the status of payments under the preference provision of the Bankruptcy Code, a provision in no way involved in the present case. *Begier* did not, either by reasoning or result, address the question of how the IRS should allocate payments made by a taxpayer who fails to make a designation. It is almost unnecessary to add that nowhere in *Begier* did the Supreme Court suggest any intent to overturn the line of decisions allowing the IRS, absent some direction from the taxpayer, to apply payments to whichever of the taxpayer's liabilities it wishes. That line of decisions disposes of this case.

The judgment of the district court is *affirmed.*

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

92-1061.

SAMUEL V. SOTIR AND NORMAN P. JOHNSON,

Plaintiffs, Appellants,

v.

UNITED STATES OF AMERICA,

Defendant, Appellee.

JUDGMENT

Entered: October 30, 1992

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

FRANCIS P. SCIGLIANO
Clerk.

Appendix A

By: DANIEL F. LOUGHRY
Chief Deputy Clerk

[cc: Mr. Baylis and Ms. Grant]

APPENDIX B — TRANSCRIPT OF BENCH OPINION OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS, BY THE HONORABLE ROBERT E. KEETON (PAGE 47, LINE 16 - PAGE 48, LINE 17)

* * *

Now I turn to the issue with respect to the way in which the payments that were made were delivered through the bank checks and the argument of the plaintiffs that as they were made, and under the terms of the Supreme Court decision in the American International Airways case, the Internal Revenue Service was forbidden to apply payments other than to the trust fund obligations. I conclude that the Supreme Court [48] decision is not directly at point and that what they said in the context of a fact situation in which there had been an agreement between the Internal Revenue Service and the payers as to how the funds would be applied that is, that they were to be applied to trust fund obligations.

The determination that by operation of law they were applicable in that way and, therefore, did not constitute preferential payment of non-trust fund assets is a determination that does not apply to the facts in this case. And I do not read the Supreme Court decision as governing this case, and it is my prediction that if the precise issue before me comes before the Supreme Court, the Supreme Court would distinguish that decision and hold it not applicable here. Off the record.

* * *

APPENDIX C — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS, BY THE HONORABLE ROBERT E. KEETON DATED NOVEMBER 27, 1991

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION

NO. 89-40068-XX-K

SAMUEL V. SOTIR and NORMAN P. JOHNSON

Plaintiffs

v.

UNITED STATES of AMERICA

Defendant

Final Judgment
November 27, 1991

Upon the findings and conclusions, and for the reasons stated orally, after trial to the bench conducted this date, it is hereby ORDERED:

(1) Judgment for the defendant on all claims against it;

(2) Judgment for the defendant on its counterclaims against plaintiffs Samuel Sotir and Norman Johnson severally in the amount of $43,273.17, plus statutory interest against Samuel Sotir and Norman Johnson severally from and after December 21, 1987, plus statutory interest against Norman Johnson from November

23, 1987 to December 20, 1987;

(3) The defendant shall not effect double collection on any part of the sum of $43,273.17 plus statutory interest.

Costs shall be taxed to plaintiffs severally.

s/ Robert E. Keeton
United States District Judge

APPENDIX D — STIPULATION OF FACTS AND ISSUES TO BE TRIED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 89-40068-XX

SAMUEL V. SOTIR and NORMAN P. JOHNSON,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

STIPULATION OF FACTS AND ISSUES TO BE TRIED

Stipulation of Uncontroverted Facts

The parties to this action, by their undersigned counsel, hereby stipulate and agree to the uncontroverted facts laid out below. The parties reserve the right to introduce other evidence provided that it is not inconsistent with the facts stipulated hereto. The stipulated facts are hereby admitted by the parties and shall be taken as true without any further proof, for purposes of this action only:

1. The plaintiff Samuel V. Sotir is an individual residing at 8 Phoenix Road, Auburn, Massachusetts.

2. The plaintiff Norman P. Johnson is an individual

Appendix D

residing at 63 Winterset Lane, Simsbury, Connecticut.

3. The defendant is the United States of America.

4. In August 1985, Samuel Sotir and Norman Johnson each purchased 31.43% of the stock of R & M Industries, Inc. (hereinafter "R & M"). Their respective 31.43% ownership interests continued through all of the applicable periods, including all four quarters of 1986 and the first and second quarters of 1987. The remainder of the stock was owned by Curtis Beck (20%) and Normand Martineau (17.14%).

5. At all times relevant to this action, R & M was a Massachusetts corporation, authorized to do business in Massachusetts.

6. R & M was in business during the four quarters of 1986 and the first quarter of 1987. R & M was in business for the first week of the second quarter of 1987 but ceased doing business on or about April 5, 1987 when it paid its final wages.

7. Samuel Sotir and Norman Johnson were the sole directors of R & M throughout all relevant periods, including the four quarters of 1986 and the first two quarters of 1987. Samuel Sotir was also the Treasurer of R & M during all relevant periods. Norman Johnson was the President of R & M during the six quarters at issue herein.

8. Samuel Sotir spent more than 60% of his time at R & M during the relevant time frame (January 1, 1986 through April 5, 1987). Generally, he was at R & M on a daily basis.

Appendix D

9. Norman Johnson spent a significant amount of his time during the relevant time period (January 1, 1986 through April 5, 1987) at R & M or doing work off site for the company.

10. Information and records regarding R & M's payroll was gathered by Curtis Beck, the Executive Vice-President of R & M, and given to Samuel Sotir. Payroll checks were then produced. Samuel Sotir signed most of the payroll checks. Norman Johnson signed all payroll checks not signed by Samuel Sotir. Norman Johnson and Samuel Sotir were the only signatories on any of R & M's bank accounts.

11. Samuel Sotir had primary responsibility for depositing the net payroll in the payroll account, for paying the withholding taxes, and for paying the trade creditors. Norman Johnson handled these duties on all occasions when Samuel Sotir did not.

12. On April 29, 1986, R & M filed an Employer's Quarterly Federal Tax Return (Form 941) with the Internal Revenue Service (hereinafter "IRS") for the first quarter of 1986. The 941 return reflected total employee wages subject to withholding of $189,909.73 and employment taxes due in the amount of $48,494.73. The return reflects that no deposits of withholding taxes were made during this quarter. Samuel Sotir signed the return as Treasurer of R & M.

13. On July 31, 1986, R & M filed an Employer's Quarterly Federal Tax Return (Form 941) with the IRS for the second quarter of 1986. The 941 return reflected total employee wages subject to withholding of $183,785.39, total employment taxes due of $44,028.62, and deposits of withholding taxes for this quarter in the amount of $3,427.16. Samuel Sotir signed the return

as Treasurer of R & M.

14. On October 20, 1986, R & M filed an Empoyer's Quarterly Federal Tax Return (Form 941) with the IRS for the third quarter of 1986. The 941 return reflected total employee wages subject to withholding of $190,190.50, total employment taxes due of $49,488.64, and total deposits of withholding taxes for the quarter in the amount of $2,318.54. Samuel Sotir signed the return as Treasurer of R & M.

15. On January 30, 1987, R & M filed an Employer's Quarterly Federal Tax Return (Form 941) with the IRS for the fourth quarter of 1986. The 941 return reflected total employee wages subject to withholding of $189,751.77 and total employment taxes due of $48,116.94. The return reflects that no deposits of withholding taxes were made during this quarter. Samuel Sotir signed the return as Treasurer of R & M.

16. On April 30, 1987, R & M filed an Employer's Quarterly Federal Tax Return (Form 941) with the IRS for the first quarter of 1987. The 941 return reflected total employee wages subject to withholding of $62,961.33 and employment taxes due in the amount of $16,140.31. The return reflects that no deposits of withholding taxes were made during this quarter. Samuel Sotir signed the return as Treasurer of R & M.

17. On July 7, 1987, R & M filed an Employer's Quarterly Federal Tax Return (Form 941) with the IRS for the second quarter of 1987. The 941 return reflected total employee wages subject to withholding of $6,285.77 and employment taxes due in the amount of $1,717.78. The return reflects that no deposits of withholding taxes were made during this quarter. The return also reflects that

the final wages paid by R & M were paid on April 5, 1987. Samuel Sotir signed the return as Treasurer of R & M.

18. The employees of R & M had their social security contributions and Federal income taxes withheld by R & M from their wages during the four quarters of 1986 and the first two quarters of 1987. However, with the exception of the $3,427.16 and $2,318.54 in deposits made during the second and third quarters of 1986, the withheld amounts were not then remitted to the IRS on a timely basis as required by law.

19. Samuel Sotir and Norman Johnson knew that the taxes were not being paid during the relevant periods (January 1, 1986 through April 5, 1987). All four of the shareholders met two to three times a week to discuss R & M's financial situation and to decide which creditiors, including the IRS, should be paid. The shareholders also discussed the possible penalties that would accrue if the taxes were not paid. Despite this knowledge, the taxes were not paid except as outlined in paragraph 18, above, and in Exhibit B, attached hereto.

20. On November 23, 1987 and December 21, 1987, a delegate of the Secretary of the Treasury made assessments against Norman Johnson and Samuel Sotir respectively pursuant to the provisions of Section 6672 of the Internal Revenue Code (26 U.S.C. Section 6672), for their willful failure, as responsible persons, to collect, truthfully account for, and pay over the income withholding and social security withholding (FICA) taxes due on the wages of, and withheld from, the employees of R & M for the third and fourth quarters of 1984, and the first and second quarters of 1985. Notices of the assessments and demands for payment, were properly made upon Norman Johnson and Samuel Sotir.

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21. The assessments against each of Samuel Sotir and Norman Johnson were in the amount of $146,559.83, broken down as follows:

Quarter	Unpaid Balance of Assessment
1st-1986	$34,915.90
2nd-1986	33,456.99
3rd-1986	35,890.02
4th-1986	34,828.39
1st-1987	6,200.18
2nd-1985	1,268.35

22. R & M made further tax deposits and/or payments with respect to its liabilities after the assessments were made against Norman Johnson and Samuel Sotir. The payments are reflected on the copies of the Certificate of Assessments and Payments (Forms 4340) attached hereto as Exhibit A. Exhibit B reflects the week in which the liability accrued and the breakdown of the payment amount among the income tax withheld, FICA withheld from the employees wages, and R & M's portion of the FICA liability.

23. Norman Johnson and Samuel Sotir admit that they were responsible persons of R & M for the relevant time periods within the meaning of 26 U.S.C., Section 6672 . Their only defense to the assessment is based on "willfulness" in that the decision to not pay the IRS was made jointly by all four shareholders of the corporation.

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24. Samuel Sotir and Norman Johnson have each made payments on the assessments, filed timely claims for refunds which were not acted upon within six months, and are now suing for the refund of the amounts paid upon the assessments. The United States filed a timely counterclaim to reduce the unpaid balance of the assessment against Norman Johnson to judgment in the amount of $43,273.17, plus interest from the date of the assessment. The United States also filed a timely counterclaim to reduce the unpaid balance of the assessment against Samuel Sotir to judgment in the amount of $143,952.09, plus interest from the date of the assessment.

Issues To Be Tried

The parties stipulate that the issues to be tried in this case are limited to the following:

1. Whether Norman Johnson and/or Samuel Sotir willfully failed to collect, account for, or remit to the United States payroll taxes withheld from the employees of R &M.

2(a). Whether all taxes withheld by R & M from the wages of its employees became trust fund taxes at the time of withholding and, accordingly, must be applied first to the trust fund portion of the liability even though the payments were not designated for that purpose.

2(b). Alternatively, whether the portions of the payments made by R & M which relate to the taxes withheld from the employees' wages must be applied to the trust fund portion of the liability when the check by which the payment was made bore a notation indicating the week to which the payment related and/or the amount of the check corresponded to the exact amount of a specific week's liability.

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3. Whether Norman Johnson and/or Samuel Sotir are entitled to a refund of any amounts paid with respect to assessments made against them by a delegate of theSecretary of the Treasury pursuant to 26 U.S.C. Section 6672.

APPROVED AS TO FORM AND CONTENT:

Dated: 10/17/91

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